Petition

81-5035

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

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SUPREME COURT, U.S.

ROBERT T. TRUITT
Petitioner

§ Case No. _____

vs

STATE OF OHIO
Respondent

§ PETITION OF ROBERT T. TRUITT FOR CERTIORARI; AND MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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PETITION FOR CERTIORARI BY ROBERT T. TRUITT

(The sections of this petition for certiorari are lettered according to the designates contained in Supreme Court Rule 21.1)

1 (a) Question Presented for Review

Where the Petitioner is alleged to be observed by police officers engaging in the sale of a Schedule IV drug known by the trade name Talwin, with two other male individuals, and the designated drug Talwin is observed to have been removed from a paper bag carried by the Petitioner, and where immediately after the sale the Petitioner is confronted by a police officer and where the Petitioner runs from that police officer and is captured by that police officer within approximately one block of the site of the sale, and while running drops the paper bag; and whereupon inspection of the paper bag there is revealed a quantity of Talwin therein; and, where the Petitioner is charged in almost identical complaints dated the same day with the same complainant police officer alleging both trafficking in a Schedule IV drug known as Talwin under Ohio Revised Code Section 2925.03 (A) (1) which is a third degree felony as charged and in addition also charged with drug abuse, a second degree misdemeanor under Ohio Revised Code Section 2925.11; and where the State chooses to prosecute immediately the Petitioner for the misdemeanor charge, at which time Petitioner is found guilty, and sentenced to serve 60 days in the Hamilton County Workhouse; and where thereafter Petitioner is indicted by a grand jury for the felony charge; it is proper for the trial court, when the issue is brought to that court by a timely filed pre-trial motion under

Ohio Criminal Rule 12 (B) (1), to grant such motion and to dismiss the pending felony charge against the defendant-appellant on the basis of former jeopardy.

1 (b) Parties to the Proceeding in this Court whose Judgment is Sought to be Reviewed

Simon L. Leis, Jr., Esquire, Hamilton County Prosecuting Attorney, 4th floor, Hamilton County Courthouse, 1000 Main St., Cincinnati, Ohio 45202.

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1 (d) Official and Unofficial Reports of any Opinions Delivered in Courts or Administrative Agencies Below

The only opinion below, which was unreported, was prepared by the Court of Appeals for the First Appellate District of Hamilton County, Ohio, under Case No. C800098, which was filed with the Court February 4, 1981. A copy of that opinion is contained in the Appendix. While this matter was heard before the Supreme Court of Ohio under a motion for leave to appeal under Case No. 81-492; the motion for leave to appeal was dismissed by entry only, without opinion by the Supreme Court of Ohio, which entry was entered May 20, 1981 and a copy of which entry is also contained in the Appendix.

1 (e) Statement of the Grounds on which Jurisdiction of this Court is Invoked

The Petitioner seeks review of an order of the Supreme Court of the State of Ohio, overruling and denying his motion for leave to appeal from the Court of Appeals for the First Appellate District for Hamilton County, Ohio, which order of the Supreme Court of Ohio was entered May 20, 1981. All matters were heard before the Supreme Court under Case No. 81-492.

The Petitioner believes that the jurisdiction in this Court is conferred by reason of 28 U.S. Code Section 1257 (3) in that this matter seeks review of the

judgment of the Supreme Court of Ohio and of the Court of Appeals for the First Appellate District of Hamilton County, Ohio; arising from the attempt by the State of Ohio to indict and prosecute the Petitioner for the greater offense of drug trafficing when the Petitioner had previously been charged, convicted and served a sentence for the lesser offense of drug possession, arising out of the same offense, and when that issue was brought before the trial court by timely pre-trial motion under Ohio Civil Rule 12 (B) (1) requesting that the Petitioner be discharged for reason for former jeopardy, which jeopardy is forbidden under the Constitution of the State of Ohio and under the Constitution of the United States.

On February 27, 1981 the Petitioner filed a Notice of Appeal to the Supreme Court of the State of Ohio with the Court of Appeals for the First Appellate District and for Hamilton County, Ohio. Thereafter, on March 26, 1981 the Petitioner filed a motion for leave to appeal to the Supreme Court of Ohio and accompanying brief and memorandum. Such motion for leave to appeal was denied by the Supreme Court of Ohio on May 20, 1981 and it is that order - judgment or decree - which is sought to be reviewed herein. The petition herein is within 60 days of that order under Rule 20 of this Court.

1 (f) Constitutional Provisions and Statutes

Constitution of the United States
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Ohio Revised Code Section 2925.03 (A) (1) and (D) (1)

" 2925.03 [Trafficking in drugs]
(A) No person shall knowingly do any of the following:
(1) Sell or offer to sell a controlled substance in an amount less than the minimum bulk amount as defined in section 2925.01 of the Revised Code. ...

(D) If the drug involved in any compound, mixture, preparation, or substance included in schedule III, IV or V, whoever violates this section is guilty of trafficking in drugs.
(1) Where the offender has violated division (A) (1) or (A) (2) of this section, trafficking in drugs is a felony of the fourth degree and if the offender has previously been convicted of a drug abuse offense, trafficking in drugs is a felony of the third degree. "

Ohio Revised Code Section 2925.11 (A) and (C) (2)

"2925.11 [Drug Abuse]

(A) No person shall knowingly obtain, possess, or use a controlled substance. ...

(C) Whoever violates this section is guilty of drug abuse:

(2) If the drug involved is a compound, mixture, preparation, or substance included in schedule III, IV or V, drug abuse is a misdemeanor of the third degree, and if the offender has previously been convicted of a drug abuse offense, drug abuse is a misdemeanor of the second degree."

Criminal Rule 12 (B) (1)

" Pleadings and Motions before Trial: Defenses and Objections...

(B) Pre-Trial motions

Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. The following must be raised before trial:

(1) Defenses and objections based on defects in the institution of the prosecution;....

1 (g) and (h): Statement of the Case; Designation in the State Court Proceedings Where the Federal Question Sought to be Reviewed was Raised.

Petitioner Robert T. Truitt, who is hereinafter designated as "Truitt" was arrested on November 3, 1979 by an officer of the Cincinnati Police Department and charged with two criminal offenses: possession of a Schedule IV drug, whose tradename is Talwin, which in Truitt's case was a second degree misdemeanor known as drug abuse, under Ohio Revised Code Section 2925.11; and drug trafficking under Ohio Revised Code Section 2925.03 (A) (1). The charges were respectively designated by Hamilton County Municipal Court Case No. 79CRB25170 A and 79CRB25169. (A third charge was also lodged against Truitt, a misdemeanor having to do with assault on the arresting officer and given case number 79CRA25170B.)

All three charges were arraigned at the same time, on November 5, 1979 and the felony charge was set for preliminary hearing on November 8, 1979; at which time after preliminary hearing, Truitt was ordered bound over to the grand jury of Hamilton County, Ohio on the felony charge, but the two misdemeanor charges were specifically held for trial in the Hamilton County Municipal Court at the request of the prosecuting attorney, in lieu of these charges "following" the felony.

Subsequently, the two misdemeanors, including the trafficking in drugs charge, were tried in the Hamilton County Municipal Court on November 19, 1979 with Truitt found guilty on both misdemeanors. Sentence ordered in the two cases was sixty days (60) and costs for the drug abuse charge and ten days (10) and costs for the assault charge.

Truitt was indicted on December 4, 1979 by a Hamilton County, Ohio grand jury on the charge of trafficking in drugs as alleged in the complaint set forth above

(and was arraigned in the Common Pleas Court of Hamilton County, Ohio on December 7, 1979 entering a plea of not guilty.)

On December 27, 1979 Truitt, through counsel and pursuant to Criminal Rule 12 (B) (1) brought a pre-trial motion in which Truitt raised the defense of former jeopardy and requested that the Common Pleas Court discharge Truitt from further trial or prosecution by reason of Truitt's previous conviction and sentence for a lesser included offense in the Hamilton County Municipal Court. The State of Ohio filed no memorandum in opposition and offered no testimony in opposition to this motion.

Truitt also submitted a supplemental memorandum dated January 15, 1980 through counsel; and thereafter the motion and supplemental memorandum were set for argument and review of the motion and memoranda of Truitt, the trial court indicated from the bench that it would grant the motion and discharge the defendant and ordered counsel for Truitt to present an appropriate entry within ten days thereof.

Thereafter, at a hearing on entry set February 5, 1980 and after considerable argument over the exact language to be contained in the entry, the trial court accepted an entry proposed by the prosecution, which entry was placed of record on this date, and in which the Court ordered that the Petitioner Truitt be discharged on the basis of having been formerly in jeopardy by reason of his conviction in the Hamilton County Municipal Court on a lesser included offense.

The State of Ohio elected to pursue an appeal of the decision based on the pre-trial motion and filed a Notice of Appeal on February 12, 1980. The State of Ohio caused the filing of a transcript of proceedings and filed its brief in this matter on May 9, 1980 in that Court of Appeals.

A brief was filed in behalf of Truitt and the matter was argued before the Court of Appeals on January 21, 1981. The Court of Appeals rendered a decision February 4, 1981, a copy of which is included in the Appendix, in which the Court of Appeals reversed the decision of the trial court and remanded the matter for further proceedings in the Court of Common Pleas.

On February 27, 1981 Truitt, through counsel, filed a Notice of Appeal in the Court of Appeals, giving notice that he intended to appeal this matter to the Supreme Court of Ohio and to ask the Supreme Court for leave to appeal to the Supreme Court.

Subsequently, the Supreme Court of Ohio, in a one page order, denied the Petitioner's motion for leave to appeal on May 20, 1981.

In reaching its conclusion on Truitt's pre-trial motion of once in jeopardy, the Common Pleas Court considered essentially testimony adduced in two proceedings which took place before the hearing on the motion; the first was the transcript of proceedings of a preliminary hearing with regard to Truitt, held in the Hamilton County Municipal Court under case number 79CRA25169 and 79CRB25170B which took place on November 8, 1979; and in addition, the transcript of proceedings held in the trial of Truitt on the misdemeanor charge of drug abuse which took place in the Hamilton County Municipal Court on November 19, 1979. Copies of these transcripts were attached and made a part of the motion that Truitt filed as a pre-trial motion on December 27, 1979 and captioned: "Defendant's Motion for Discharge - Defense of Former Jeopardy". Without opposition of the prosecuting attorney assigned to the case in behalf of the State of Ohio, these transcripts, under certificates of the respective reporters, were considered by the trial court. (Before the Court of Appeals for Hamilton County, Ohio, in addition to these

transcripts attached to the motion, there were in addition transcripts of the proceedings before the Common Pleas Court on three separate occasions which were essentially argument by counsel on each side, but which did not include any testimony.) Lastly, the Court of Common Pleas also considered certified copies, under seal of the Clerk of the Hamilton County Municipal Court, of the complaints and affidavits which instituted the two charges from which the defense of once in jeopardy arises in this matter - one a felony of trafficking in drugs, and the othe misdemeanor of drug abuse. There was no objection rendered by the prosecuting attorney with regard to consideration of these certified documents, either.

A summary of the circumstances concerning the charges brought against Truitt can be considered with regard to the testimony of the arresting officer, Gregory of the Cincinnati Police Department, drawn from the transcript of the preliminary hearing of November 8, 1979:

The State of Ohio called Cincinnati Police Officer David Gregory, who assigned to Central Vice Control (R/4), who testified that on November 3, 19 approximately 4:00 p.m. in the vicinity of 1505 Republic Street, in Hamilton Ohio, he observed Truitt along with another black male, named Preston Trig walking up and down the street and approaching "several subjects". (R/5) Th testified: "We saw them huddle with them at one point. I saw Mr. Lawrence hand Mr. Preston Triggs several dollar bills, at which time I saw Mr. Tru Mr. Carter several pills, pink and blue pills." (R/5). The Officer indicate that he radioed other officers who were also in the observation area and ob Truitt move from 15th and Race, eastbound on 15th toward Republic Stree Officer indicated that Truitt was observed going up Republic, in between t

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later identified as 1505 Republic and that he came through a back alley, onto Race Street, which was a vacant lot between numbers 1504 and 1510 (R/6). The Officer observed Truitt standing there with a brown paper bag in his hand and when the Officer identified himself he alleges Truitt dropped the bag and ran into the alley with the Officer in pursuit. He was apprehended apparently at the other end of the alley by Officer Gregory, on Race Street. The Officer also testified that he arrested the alleged customer in the transaction, identified as Mr. Carter, at the corner of Liberty and Race (R/7). The officer indicated that as he approached him, he saw pills in Carter's hand, identified himself and the subject, upon realizing he was confronted by a police officer, threw the pills in the air, but that the pills were recovered on the ground, approximately five feet from Carter. The pills recovered from Carter were alleged by the Officer to be the ones that Truitt was observed selling and were submitted to a lab for examination.

In summary then, the case against Truitt can simply be summarized as a police officer observing Truitt through binoculars at a distance at which the officer alleges he could see both the color of the pills sold allegedly by Truitt, together with the fact that Truitt allegedly took the pills from a small bottle which in turn were taken from a paper bag, which bag was held by Truitt; that as soon as the officer could perceive that the sale was completed, he immediately took action to cause the arrest of Truitt by pursuing Truitt both by car and then on foot; and that he was sufficiently close to Truitt - almost immediately, that he could observe Truitt carrying the same paper bag, then dropped the bag, and that when Truitt was taken into custody, the bag was also taken into custody, at which time it was discovered that Talwin pills were within the bag. The Officer was also present when momentarily

the customer was arrested who had in his hand some of the same pills. While no time is stated in the record it is apparent that the whole proceeding took probably no longer than 10-15 minutes from the time that Truitt was first observed making the sale to Carter until Truitt and Carter were both in custody and the contraband recovered.

It is also important to note with regard to the facts of this case that the complaints which were attached in certified form to the Petitioner's supplemental memorandum filed January 15, 1980, both allege that the Petitioner was either possessing or selling Talwin on November 3, 1979, that each have the same affiant and each were sworn on the same day, November 3, 1979 before the same notary public, in front of the same Clerk, and each were filed on the same day in the Hamilton County Municipal Court on November 4, 1979.

Likewise, attached to the same Petitioner's memorandum was a certified copy of the court order in which Truitt was found guilty of the possession charge - drug abuse - by a Judge in the Hamilton County Municipal Court on November 19, 1979 and the journal entry reflects that Petitioner was given 30 days imprisonment therefor.

It should also be noted that at the conclusion of the preliminary hearing (transcript of November 8, 1979) that when the prosecuting attorney assigned to the case was asked if he wanted the "misdemeanor to follow", it was the request of the State that: "No, your Honor, We would request they stay here."

Subsequently, the Petitioner was indicted by a grand jury in Hamilton County, Ohio on December 7, 1979 as the record submitted by the Clerk of the Common Pleas Court will reveal; on a charge of trafficking in drugs; and therefore, on December 7, 1979 upon arraignment Truitt entered a plea of not guilty.

The motion and memorandum for discharge of the Petitioner raising the defense of former jeopardy under Criminal Rule 12 (B) (1) was thereafter filed as indicated above and after several sessions in consideration of the motion and argument thereof, these being January 11, 1980 and January 17, 1980 and February 5, 1980, an entry was put of record on February 5, 1980 granting the motion of Truitt and discharging him.

1 (j) Argument in Support of the Allowance of the Petition for Writ of Certiorari

It is important for the purposes of this petition to look at the elements of the two charges for which Truitt was charged to determine the elements of each, since it is the proposition of the Petitioner that drug abuse is a lesser included offense of trafficking in drugs:

First, drug abuse, as set forth as a crime in Ohio Revised Code Section 2925.11 is as follows:

"(A) No person shall knowingly obtain, possess or use a controlled substance."

The elements of this offense as they may apply to the factual situation relating to Truitt are that Truitt had possession of a controlled substance (the quantity of the substance is not an issue in this appeal, though quantity is an issue, of course, in all the drug statutes.)

Secondly, trafficking in drugs, as set forth in Ohio Revised Code Section 2925.03 is as follows:

"(A) No person shall knowingly do any of the following:
(1) Sell or offer to sell a controlled substance in an amount less than the minimum bulk amount as defined in §2925.01 of the Revised Code..."

Again, as it applies to Truitt, the statute simply declares that Truitt would have to have in his possession the designated bulk amount of the controlled substance and either sell or offer to sell that substance. It must be assumed that in order to sell or offer to sell Truitt would have to have in his possession or at least in his constructive possession the controlled substance. And, if Truitt had the controlled substance in his possession for the purposes of sale or offering to sell it, he would

also be guilty of drug abuse as a possessory crime. It is, therefore, the argument of Truitt that drug abuse by its elements which essentially include possession of the controlled substance is a lesser included offense in the charge of trafficking in drugs and that if the State failed to prove that the Petitioner sold or offered for sale a controlled substance it could nevertheless pursue conviction of drug abuse as long as the Petitioner could be found in possession of the controlled substance.

It is obvious from the record that Truitt had already been tried for the lesser included offense of drug abuse before his indictment and attempted prosecution for the greater offense of trafficking in drugs. Truitt asserts through counsel that this subsequent indictment of prosecution is barred and that he was properly discharged because he had been once in jeopardy.

The State will admit the leading case on point involving this issue is found in an Ohio conviction appealed to the Supreme Court of the United States in Nathaniel Brown v. State of Ohio, 432 U.S. 161, ___ L. Ed. 2d ___, 97 S. Ct. 2221 (1977) which provides an inclusive memorandum with regard to the law on the issue of double jeopardy or once in jeopardy. Mr. Justice Powell indicates, among other things, that the established test of determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment - that is, to allow the defendant to be prosecuted or in the alternative to protect the defendant against a second prosecution for the same offense after conviction, is set forth in Blockburger v. United States, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932) wherein it is stated:

> "The application rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact that the other does not...

> The test emphasizes the elements of the two crimes, 'if each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to estabilsh the crimes....' Iannelli v. United States, 420 U.S. 770, 785 N. 17, 95 S. Ct. 1284, 1294, 43 L. Ed. 2d 616 (1975)"

It would appear therefore that the test declares that if there are two crimes and each requires proof that the other does not, then the test is satisfied, notwithstanding the substantial overlap of the proof offered to establish the crimes. In the alternative, which counsel respectfully suggests is true in the case of Truitt; if two offenses are the same under this test for the purposes of barring consecutive sentences in a single trial, they necessarily will be the same for the purposes of barring successive prosecutions. It may be said also that the test reiterated in the Brown case that the two offenses are the same unless each requires proof that the other does not when applied to the matter at hand with regard to Truitt, gives us this analysis; in both cases the charges have a common element of proof required of the State of the element of possession or constructive possession of a scheduled drug. Only one, the charge of trafficking in drugs, has an additional element involved, and that is the sale or attempted sale of the scheduled drug. To paraphrase the Brown decision in applying the Blockburger test, the lesser offense of drug abuse - possession of a scheduled drug - requires no proof beyond that which is required for conviction of the greater offense of trafficking - the sale of a scheduled drug. Therefore, the greater offense of sale by definition, is "the same" for the purposes of double jeopardy as any lesser offense included in it. To quote Justice Powell:

> "Applying the Blockburger test, we agree with the Ohio Court of Appeals that joyriding and auto theft, as defined by the court, constitute 'the same statutory offense' within the meaning of the Double Jeopardy Clause. App. 23. For it is clearly not the case that 'each statute requires proof of an additional fact which the other does not.' 284 U.S., at 304, 52 S. Ct. at 182. As is invariably true of a greater and lesser included offense,

the lesser offense - joyriding - requires no proof beyond that which is required for conviction of the greater - auto theft. The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it.

This conclusion merely restates what has been this Court's understanding of the Double Jeopardy Clause at least since In Re Nielsen was decided in 1889. In that case the Court endorsed the rule that:

'where...a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.' 131 U.S. at 188, 9 S. Ct., at 676.' "

Brown is also important in that it resolves the issue of whether the order in which the lesser and greater offenses are prosecuted makes any difference to the defense of former jeopardy. Justice Powell resolved this issue by stating:

"Although in this formulation the conviction of the greater precedes the conviction of the lesser, the opinion makes it clear that the sequence is immaterial. Thus the Court treated the formulation as just one application of the rule that two offenses are the same unless each requires proof that the other does not. Id., at 188, 9 S. Ct. at 676, citing Morey v. Commonwealth, 108 Mass., at 434. And as another application of the same rule, the Court reported with approval the decision of State v. Cooper, 13 N.J. L. 361 (1833), where the New Jersey Supreme Court held that a conviction for arson barred a subsequent felony-murder indictment based on the death of a man killed in the fire. Cf. Waller v. Florida, 397 U.S. 387, 390, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970). Whatever the sequence may be, the Fifth Amentment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."

(91 S. Ct. also at page 2226)

[Footnotes in the quotation are omitted; however, the Court might read carefully footnote 6 in the opinion, which expands on the Blockburger test and indicates some examples of other applications of the Double Jeopardy rule which not only prohibits cumulative punishment, but successive prosecutions, of course.]

Finally, Brown is also important because in a concurring opinion, Justices Brennan and Marshall had a further basis for applying the defense once in jeopardy and relates to the failure of the State to prosecute the defendant in a single proceeding

with regard to all crimes that arose from the same single criminal act, occurrence, episode or transaction:

> "I join the Court's opinion, but in any event would reverse on the ground, not addressed by the Court, that the State did not prosecute petitioner in a single proceeding. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of 'all the charges against a defendant that grow out of single criminal act, occurrence, episode or transaction.' Ashe v. Swenson, 397 U.S. 436, 453-454, 90 S. Ct. 1189, 1199, 25 L. Ed. 2d 469 and n. 7 (1970) (Brennan, Jr., concurring). See Thompson v. Oklahoma, __ U.S. ___, 97 S. Ct. 768, 50 L. Ed. 2d 770 (1977). (Brennan, Jr., dissenting) and cases collected therein."

(97 S. Ct. at page 2227)

If then either interpretation of the law in Brown are applied, we can find that the majority opinion declares that it makes no difference whether the greater precedes the conviction of the lesser or the reverse takes place, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense where one of the offenses, the lesser, includes no proof beyond that which is required for conviction of the greater offense; or, in the alternative, that the Double Jeopardy Clause of the Fifth Amendment is applied to the States as Justice Brennan indicates, and requires that the prosecution, in one proceeding of all charges against defendant that grow out of a single act, occurrence, episode or transaction, results in the defendant receiving the protection of the Fifth Amendment prohibition against Double Jeopardy.

Note the language in Jeffers v. United States, __ U.S. __ L. Ed. 2d ___, 97 S. Ct. 2207 (1977) in which Justice Blackmun states:

> "Brown v. Ohio, __ U.S. __, 97 S. Ct. 2221, 51 L. Ed. 2d __, decided today, establishes the general rule that the Double Jeopardy Clause prohibits a State or the Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense. Post, at ____, 97 S. Ct. at 2226-2227. What lies at the heart

of the Double Jeopardy Clause is the prohibition against multiple prosecutions for the 'same offense'. See United States v. Wilson, 420 U.S. 332, 343, 95 S. Ct. 1013, 1021, 43 L. Ed. 2d 232 (1975). Brown reaffirms the rule that one convicted of a greater offense may not be subjected to a second prosecution on the lesser offense, since that would be the equivalent of two trials for 'the same offense'. Post, at __, 672, 675, 33 L. Ed. 118 (1889). Because two offenses are 'the same' for double jeopardy purposes unless each requires proof of an additional fact that the other does not, post, at __, 97 S. Ct. at 2226, it follows that the sequence of the two trials for the greater and the lesser offense is immaterial, and trial on a greater offense after conviction on a lesser ordinarily is just as objectionable under the Double Jeopardy Clause as the reverse order of proceeding. Cf. Waller v. Florida, 397 U.S. 387, 390, 90 S. Ct. 1184, 1186, 25 L. Ed. 2d 435 (1970)...."

(97 S. Ct., at page 2216)

While the State emphasized in its brief in the Court of Appeals, State of Ohio v. Thomas, 61 Ohio St. 2d 254 (1980), this decision simply reiterates the dictates of several cases involved with the issue of Double Jeopardy, including Brown, Blockburger, and several other cases cited in Brown and of course makes the same emphasis.

Thomas does emphasize in the syllabus the following:

"4. Even though the same act or transaction may constitute a violation of two distinct statutory provisions and would permit the imposition of multiple sentences, successive prosecutions will be barred in certain circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. See Ashe v. Swenson, 397 U.S. 436 and Nielsen, Petitioner, 131 U.S. 176)"

The value of Thomas therefore is to indicate the breadth of the once in jeopardy defense to include not only those elements mentioned in Brown, supra, but also to emphasize that once in jeopardy has certain aspects of the civil concept of collateral estoppel.

The Ohio Supreme Court in the Thomas case, taking into account this aspect of collateral estoppel, made the following reference:

> "This more stringent 'replication of evidence' test was applied by the Supreme Court in the later case of Harris v. Oklahoma (1977) 433 U.S. 682. In Harris, the defendant and a companion robbed a grocery store. During the course of the robbery, the defendant's accomplice shot and killed a clerk. Defendant was convicted of felony-murder, but was subsequently tried and convicted of robbery with firearms on facts arising out of the same incident. In reversing the second conviction, the court held, at page 682, that:
>
> > 'When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one.'
>
> In Harris, the defendant was first convicted of the homicide offense, and then of the robbery offense. The order of prosecution in the cause sub judice is precisely opposite. However, the sequence of prosecutions is immaterial in modern double jeopardy analysis. Brown, supra, at page 168. The import of Harris is that a person may not be subjected to multiple prosecutions when proof of the one offense is necessary, as a practical matter, to prove the other, and both completed offenses arose out of the same criminal conduct.

To cite Harris directly, at page 2913 of the opinion:

> "[A] person [who] has been tried and convicted for a crime which has various incidents included in it ... cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." In Re Nielsen, supra, 131 U.S., at 188, 9 S. Ct., at 676. See also: Waller f. Florida, 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970); Grafton v. United States, 206 U.S. 333, 352, 27 S. Ct. 749, 754, 51 L. Ed. 1084 (1907).

Counsel also introduced in the Court of Appeals and in the trial court the concept continually offered by Justice Brennan in concurring opinions both in Harris supra, and in Ashe v. Swenson, 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189 (1970) and Thompson v. Oklahoma, 429 U.S. 1053, 50 L. Ed. 2d 770, 97 S. Ct. 768 (1977) (Brennan, J., dissenting from denial of certiorari) that his view of the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in

extremely limited circumstances, of all charges against a defendant that grow out of a single act, occurrence, episode or transaction. It is important to note that in the transcript of the January 17, 1980 session of argument with regard to the defendant's motion, the trial court judge states, as a basis for his granting of the motion, the following:

> "The Court: Thank you. I am basing my decision exclusively on the preliminary hearing transcript and there is considerable detail as to how the defendant was apprehended and the period of time from the time that he was observed standing during the course of the transaction. I find that this is a single transaction and that the drug abuse is a lesser included offense of the trafficking, that the State has prosecuted the defendant on the misdemeanor, first charging him with drug abuse of Talwin, a schedule 4 drug, prior to the time that they -- that he was brought to trial on the felony of trafficking, to wit Talwin, a 4th degree - a schedule 4 drug, and that both complaints charge that this occurred on the same day. The preliminary hearing transcript indicates that this was one continuous transaction and that some of the Talwin was sold, that is correct, and some was obtained from him after his arrest shortly thereafter.
>
> I find, however, by the State proceeding on the misdemeanor, they proceeded on a lesser included offense and cannot now prosecute the defendant on the more serious offense under the Brown case, as cited by Mr. Bavely in both memoranda that he presented to the Court, and that Brown versus State of Ohio is 97 Supreme Court 2221, 1977 decision."

As a final consideration, it should be noted that in reaching its conclusion, the First District Court of Appeals in this matter, in its several page opinion, did not once refer to Brown v. Ohio, supra, which is the leading current case on the application of the rules of Double Jeopardy and once in jeopardy.

CONCLUSION

The Court should grant the writ in this matter in order that this Court may pass upon the following important Constitutional issues:

1. In furthering the administration of justice, prosecuting attorneys should be required to prosecute in a single prosecution, all criminal charges that grow out of a single criminal act, occurrence or transaction and that the State, in its prosecution, may not delay the administration of justice and require additional time expenditures by already overworked trial judges with crowded trial dockets; by the sheer expediency of dividing a single criminal act, occurrence or transaction into several or multiple prosecutions, in order to secure the simple expedient benefit of imposing multiple sentences on a defendant, which the prosecution may do at its own whim. In addition, the conclusion by the Supreme Court in granting this writ considering this matter on appeal, would allow this Court to consider that the Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.

2. Secondly, in the limited manner as it relates to this case and the law of the State of Ohio concerning drug trafficking and drug abuse, this Court of course on granting the writ could consider whether or not drug abuse is a lesser included offense of drug trafficking under Ohio law.

Respectfully submitted,

E. Hanlin Bavely
Attorney for Petitioner Robert T. Truitt
Of counsel: Kelley, Grossheim & Bavely
1107 Tri State Bldg.
Cincinnati, Ohio 45202

1 (k). Appendix

Entry Further Continuing Bond of Defendant Robert T. Truitt, Staying Time for Trial Pending Appeal to the Supreme Court of the United States of America

Entry Overruling Petitioner's Motion for Leave to Appeal from the Court of Appeals for Hamilton County, Ohio to the Supreme Court of Ohio
(This order is the order appealed from to the Supreme Court of the United States)

Order Granting Motion for Appointment of Counsel to Perfect Appeal to the Supreme Court of Ohio

Notice of Appeal from the First Appellate District of Hamilton County, Ohio to the Supreme Court of Ohio

Decision of the First Appellate District for Hamilton County, Ohio: State of Ohio v. Robert T. Truitt, Case C800098

Notice of Appeal - State of Ohio from the decision of the Hamilton County, Ohio Common Pleas Court in Case B793945 Granting the pre-trial Motion of Robert T. Truitt - Once in Jeopardy

Entry Granting Defendant's Motion to Dismiss on Basis for Former Jeopardy: State of Ohio v. Robert T. Truitt, Case B793945 as Entered in Common Pleas Court of Hamilton County, Ohio

Defendant's Supplemental Memorandum: Defendant's Motion for Discharge - Defense of Former Jeopardy (Hamilton County Common Pleas Court under Case B793945 - filed January 16, 1980)

Defendant's Motion for Discharge - Defense of Former Jeopardy (as above, filed December 27, 1979 omitting the memorandum and argument)

Motion of Petitioner to Proceed In Forma Pauperis

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO Plaintiff	§	No. B793945
vs	§	ENTRY FURTHER CONTINUING BOND OF DEFENDANT ROBERT T. TRUITT, STAYING TIME FOR TRIAL PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA
ROBERT T. TRUITT Defendant		

This matter came on to be heard further upon the mandate and order remanding the within cause to this Court as entered by the Court of Appeals for the First Appellate District of Hamilton County, Ohio under case number C800098, and further, the order of the Supreme Court of the State of Ohio under case number 81-492;

And, it appearing that further proceedings would hereafter be necessary in the form of trial of this matter by reason of such remand;

And, it appearing that the defendant Robert T. Truitt, through counsel, desires to appeal by motion for writ of certiorari to the Supreme Court of the United States, the decision of the Court of Appeals for the First Appellate District, reversing and remanding the former order of this Court directing that such defendant be discharged and the proceedings against him dismissed by reason of former jeopardy;

Now, therefore, based upon the agreement of E. Hanlin Bavely, Esquire, as attorney for the defendant Robert T. Truitt, and Leonard Kirschner, Esquire, Assistant Hamilton County Prosecutor, in behalf of the State of Ohio; it is the order of this Court as follows:

1. The bond of Robert T. Truitt previously set by this Court, based upon

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his own recognizance pending the appeal of the State of Ohio from the decision of this Court as formerly made; is hereby continued until further order of this Court and until such time as the matter of appeal contemplated by this defendant shall be resolved by the Supreme Court of the United States of America;

2. Time for trial in this matter as may be determined by the statutes of the State of Ohio is hereby tolled and suspended, pending resolution of such appeal and as evidenced by agreement of the parties herein.

Leonard Kirschner
Assistant Hamilton County Prosecutor
Counsel for State of Ohio

E. Hanlin Bavely
Trial attorney for defendant
Robert T. Truitt
Of counsel: Kelley, Grossheim & Bavely
1107 Tri State Bldg.
Cincinnati, Ohio 45202

WAIVER OF TIME FOR TRIAL

The defendant, Robert T. Truitt, acknowledging that he has read this entry and understands its terms, hereby acknowledges that the time for trial of this cause on the remand herein, is hereby tolled and may be extended until such time as appeal to the Supreme Court of the United States is completed herein and he does therefore expressly waive time of trial herein.

Robert T. Truitt

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SC78 BARRETT & OTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

*19*81 *TERM*

To wit: May 20, 1981

State of Ohio,
Appellee,

vs.

Robert T. Truitt,
Appellant.

No. 81-492

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for HAMILTON *County*

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Affidavit of poverty

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

Clerk

Deputy

29

Entered 5/21/81.

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

FEB 18 1981

STATE OF OHIO	:	
Plaintiff	:	No. B793945
vs	:	
ROBERT T. TRUITT,	:	ORDER GRANTING MOTION FOR APPOINTMENT OF COUNSEL TO PERFECT APPEAL TO THE SUPREME COURT OF OHIO
Defendant	:	

Defendant, Robert T. Truitt, having moved the Court for appointment of counsel to file in the Supreme Court of Ohio a motion to certify the decision of the First District Court of Appeals in No. C 800098, reversing the judgment of this Court entered February 5, 1980, and it appearing that the defendant remains indigent and without funds to retain counsel at his own expense,

It is, therefore, ordered that defendant's motion for appointment of counsel is granted on condition defendant also seeks such appointment of counsel from the Supreme Court of Ohio at the proper time.

Robert H. Gorman, Judge

Leonard Kirschner, Esq.
Assistant Prosecuting Attorney

E. Hanlin Bavely, Esq.
Attorney for Defendant

entd. 2/19/81 Jaime.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
COUNTY OF HAMILTON
STATE OF OHIO

STATE OF OHIO
Plaintiff-Appellant

vs

ROBERT T. TRUITT
Defendant-Appellee

No. C-800098

NOTICE OF APPEAL

The Defendant-Appellee Robert T. Truitt, hereby gives Notice of Appeal to the Supreme Court of the State of Ohio, from the order and decision of the Court of Appeals for the First Appellate District of the State of Ohio, in Hamilton County, Ohio; inert February 4, 1981 wherein this Court of Appeals reversed the decision of the Court of Common Pleas of Hamilton County, Ohio dismissing the indictment of this defendant-appellee and ordering the discharge of this defendant-appellee by reason of former jeopardy, which decision of the Court of Common Pleas of Hamilton County, Ohio is found under Case No. B793945 and which decision and order of the Court of Appeals remanded such cause for further proceedings in this Common Pleas Court.

F. Hanlin Bavely
Attorney for Defendant-Appellee Robert Truitt
Of counsel; Kelley, Grossheim & Bavely
1107 Tri State Bldg.
Cincinnati, Ohio 45202

CERTIFICATE

I certify that a copy of this Notice of Appeal has been sent by regular mail on this ___ day of February 1981 to Leonard Kirschner, Esquire, Assistant

Hamilton County Prosecutor, 4th floor Hamilton County Courthouse, 1000 Main St., Cincinnati, Ohio 45202 as attorney for the State of Ohio, Plaintiff-Appellant.

E. Hanlin Bavely
Attorney for Defendant-Appellee Robert Truitt

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	NO. C-800098
Plaintiff-Appellant,	:	
vs.	:	D E C I S I O N.
ROBERT T. TRUITT,	:	
Defendant-Appellee.	:	

FEB 4 1981

CLERK OF COURTS

Messrs. Simon L. Leis, Jr., Leonard Kirschner and Thomas Sperber, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Mr. E. Hanlin Bavely, 1107 Tri-State Building, Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

The State of Ohio as appellant seeks reversal of the trial court's dismissal of the indictment and discharge of the defendant by reason of former jeopardy. The state asserts in its single assignment that the court below erred in holding that the prosecution for the sale of a controlled substance was barred by defendant's earlier misdemeanor conviction for possession of a separate and distinct quantity of drugs. We agree with the State.

Defendant was the subject of a police surveillance designed to observe suspected drug trafficking at a particular location. The officers observed the defendant deliver several pills, later identified as Talwin (pentazocine), to an individual in exchange for currency. At the approach of uniformed police officers, the pair walked away in different directions. The defendant discarded a bag he was carrying before he was finally apprehended, and the bag contained Talwin.

The defendant was charged with both possession of a controlled substance (Talwin found in the bag) and sale of a controlled substance (Talwin delivered to the individual). The possession charge, a misdemeanor, was tried separately in the Hamilton County Municipal Court, and the defendant was found guilty. It is this conviction that was the basis of his motion in the Court of Common Pleas to dismiss the sale charge, which under the allegations of the indictment was a felony of the second degree.

The law applicable to this case is found in *Blockburger v. United States* (1932), 284 U.S. 299. The *Blockburger* rule, simply stated, is that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." (Emphasis added.) *Id.* at 304. The state asserts that the appropriate application of the *Blockburger* rule requires an analysis of the elements comprising the two offenses. We agree with the state's desired result but not with its reasoning.

We agree that *Blockburger* makes the definitive statement of the law, but we hold that on the facts *sub judice*, the first step in applying the *Blockburger* test requires us to determine whether the two offenses charged stem from the same act or transaction. We do not reach and do not decide whether from an abstract point of view each of the statutes involved includes an element not shared by the other.

The facts of *Blockburger* are helpful in implementing the test. Therein the defendant was charged *inter alia* with the sale of morphine to an individual and also with a second sale of morphine to the same individual on the following day. In affirming the two convictions, the Supreme Court held that the first sale had been completed and that the second sale, however close in time, was a separate and distinct transaction. The court distinguished between offenses which are continuous in character and those that consist of an isolated act.[1] *Id.* at 302.

The record in the instant case indicates that the defendant sold a particular quantity of pills to an individual. Shortly after that transaction was completed, the defendant was apprehended with constructive possession of a quantity of pills separate and distinct from those involved in the sale. The defendant was not charged with possessing the drugs he sold, nor with selling the drugs later found in his constructive possession. We hold that the defendant's possession of the additional pills was an act separate and distinct from the sale.

This principle is illustrated by a more obvious example. Assume the defendant had been successful in his flight from the police immediately after the sale, but was apprehended a month later with

a quantity of Talwin on his person. The double jeopardy provisions would, without doubt, allow his prosecution for both the prior sale and the later possession. We fail to see how the immediacy of defendant's arrest in the instant case should lead to a different result. The legislature has decreed that possession is one offense and sale is another, and the defendant was charged with two separate offenses. The legislature has not chosen to make a crime of dealing in (pushing) drugs as a continuing course of conduct, but to proscribe a series of acts committed while dealing in drugs with a separate punishment for each. *See Whalen v. United States* (1980), 100 S. Ct. 1432.

A useful analogy is supplied by the case of *State v. Roberts* (1980), 62 Ohio St. 2d 170, 405 N.E.2d 247, in which a different aspect of double jeopardy was considered. The defendant therein was charged with both the possession for sale of a narcotic drug and with the sale of a narcotic drug.[2] The court held that the statute prohibiting two convictions for allied offenses of similar import (R.C. 2941.25) allowed him to be convicted of only one of those offenses, because "the facts demonstrate that both charges were based upon a single sale and involve the same parties and the same type and quantity of drugs, and it is not proven that the defendant possessed a quantity of any type of narcotic drug in excess of the amount sold. . . ." *Id.* at 174. The court reasoned that in such circumstances the defendant's possession of the drugs was incidental to and an indivisible part of the sale. In the instant case, the drugs possessed by the defendant were not the drugs he sold.

The single assignment has merit.

The appellee's brief includes a section designated as an assignment of error, wherein he claims that the state failed to obtain leave to appeal in a timely and proper manner. However, appellee did not file a notice of cross-appeal, and we ignore the attempt to present the issue because it is not properly before this Court. *See* App. R. 4; *State, ex rel. Bossa v. Giles* (1980), 64 Ohio St. 2d 273, 274, n.1, ___ N.E.2d ___.

We reverse the judgment below and remand this case for further proceedings.

CASTLE, P. J., PALMER and BLACK, J. J.

1. The Supreme Court contrasted the facts of *Blockburger* with those of *Ex Parte Snow* (1887), 120 U.S. 274, wherein it was held that the offense of cohabitating with more than one woman was a continuous offense having duration and not an isolated act under the statute in question.

2. The defendant in *Roberts* was charged under the now repealed provisions of R.C. 3719(20)(A) and R.C. 3719.20(B).

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

IN THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

FILED
Criminal Division
FEB 12 1980
HAMILTON COUNTY
ROBERT D. JENNINGS
CLERK OF COURTS

STATE OF OHIO :

Plaintiff-Appellant : B 793945

vs. :

ROBERT T. TRUITT : NOTICE OF APPEAL

Defendant-Appellee :

Now comes Simon L. Leis, Jr., Prosecuting Attorney of Hamilton County, Ohio and does hereby give Notice of Appeal from the decision of this Court placed on record on the 5 day of February, 1980 in which this Court granted a pretrial Motion to Dismiss this indictment and the charges contained therein.

Simon L. Leis, Jr.
Prosecuting Attorney

Leonard Kirschner,
Assistant Prosecuting Attorney

Thomas Sperber
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Plaintiff-Appellant

1.

19

Brief 2/15/80.

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CERTIFICATION

I hereby certify that I have posted a copy of the above Notice of Appeal to Counsel for the Defendant and the Court on this 13 day of February, 1980 by personally delivering a copy to the Court and by United States Mail prepaid to Counsel for the Defendant, E. Manlin Bavely, Attorney at Law, 1107 Tri State Building, Cincinnati, Ohio 45202.

Leonard Kirschner
Assistant Prosecuting Attorney

20

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ENTERED
FEB 5 1980
MAR 5

APPENDIX A

IN THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

STATE OF OHIO	:	
Plaintiff-Respondent	:	B 793945
vs.	:	
ROBERT T. TRUITT	:	ENTRY GRANTING DEFENDANT'S MOTION TO DISMISS ON BASIS OF FORMER JEOPARDY
Defendant-Movant	:	

This matter having come on for hearing on the defendant's motion for discharge, defense former jeopardy and the supplemental memorandum and the docket records and journal entries and the transcript of a criminal trial of the defendant on a possession of talwin charge and based upon said matters submitted to this court, this court does hereby find that:

(1) The defendant was observed by police officers with binoculars participating in the sale of drugs, to-wit Talwin on November 3, 1979 at the corner of Fifteenth and Race Streets in the City of Cincinnati County of Hamilton and State of Ohio.

(2) That the defendant obtained ~~the~~ Talwin pills from his pocket.

(3) That the defendant and his associate started walking west on Fifteenth Street to Republic Street.

21 (15)

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FILED
DEC 6 1982

(4) That the purchaser of the Talwin started walking north on Race Street.

(5) That an attempt was made to apprehend the defendant on the drug sale which had been previously observed at Fifteenth and Race Streets at which time the defendant took off running through a yard at about 1505 Republic Street and back through a vacant yard between 1504 and 1510 Race Street in Cincinnati, Hamilton County, Ohio

(6) That when the police officer identified himself as a police officer the defendant threw down a brown paper bag which later was determined to have contained Talwin.

(7) That the defendant was later charged with the misdemeanor offense of possession of Talwin which was in the brown paper bag at the time of his apprehension in the vacant yard between 1504 and 1510 Race Street and he was charged with sale of Talwin which had occurred earlier at the corner of Fifteenth and Race Streets.

(8) That the Talwin which was sold to the purchaser was not the same Talwin which the defendant was charged with the possession of.

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IMAGE 7

(9) That the Talwin which was sold by the defendant was recovered from the purchaser of same at the corner of Liberty and Race Streets.

(10). That the defendant was tried and found guilty of the possession of Talwin found in the brown paper bag which he dropped at the time of his apprehension.

(11) That the charge which is currently pending in this court on this indictment relates to the Talwin sold at the corner of Fifteenth and Race Streets.

Based upon the above findings of fact this court does hereby find that the motion to dismiss based upon former jeopardy is well taken by reason of the defendant's prior trial on the possession charge which bars the defendant's trial in this matter under the doctrine that the defendant has been found to have been in jeopardy PMC As Set Forth Further by the Court's order PRONOUNCEMENT AT THE TIME OF THE RULING. PMC

This court does therefore grant the motion to dismiss the charge in this case and said indictment is hereby dismissed.

4.

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

FILED
Criminal Division
JAN 16 1980
HAMILTON COUNTY
ROBERT D. JENNINGS
CLERK BY

STATE OF OHIO
Plaintiff

vs

ROBERT TRUITT
Defendant

B793945

DEFENDANT'S SUPPLEMENTAL MEMORANDUM: DEFENDANT'S MOTION FOR DISCHARGE - DEFENSE OF FORMER JEOPARDY

1. Proceedings in the Hamilton County Municipal Court relating to the charge set forth in the indictment.

Attached hereto and made a part of this memorandum are certified copies of the following documents in the Municipal Court that relate to the charge which is now set forth in the indictment pending in this Court, as well as the trial of the lesser included misdemeanor as alleged by the defendant:

Complaint under Ohio Revised Code Section 2925.11 for drug abuse under Case 79CRB25170A, which alleges that the defendant Robert Truitt possessed a Schedule IV controlled substance known as Talwin.

Certified copy of the docket sheet relating to charge 79CRB25170A which indicates that on November 19, 1979 the defendant was found guilty in the Hamilton County Municipal Court by Judge Ranz of the charge of drug abuse and given 60 days in the Community Correctional Institution and costs. (To the knowledge of counsel, Hamilton County Municipal Court does not provide separate judgment entries with regard to misdemeanor prosecution, but uses a docket sheet of the type attached hereto, which gives appearances, continuances, and the disposition of the litigation.)

Certified copy of the complaint in case 79CRA25169 in which the defendant Robert Truitt is charged with trafficing in drugs under §2925.03 (A) (1) relating to a Schedule IV controlled substance known as Talwin. This charge underlies the present indictment which is the subject of this motion.

The complaints in both cases allege the defendant was either possessing or selling Talwin on November 3, 1979, have the same affiant and were sworn on the same day, November 3, 1979 by the same notary public, in front of the same Clerk, and were each filed on the same day in Municipal Court on November 4, 1979

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It may be respectfully [illegible] that this defendant was charged with both the greater and lesser included offenses of trafficking in drugs and drug abuse and that both charges arose out of the same set of facts on the same date and involved the same drug, Talwin; for which the defendant was first convicted of the lesser included offense in Municipal Court on November 19, 1979.

2. The matter of the "pink pills"

The record in this matter is clear with regard to the testimony of the police officer, at least for the purposes of this motion, relating to and includes testimony from time to time concerning the matter of pills that have the color variously described as pink, peach or orange. For example, in the record of the preliminary hearing the arresting police officer refers to the defendant's alleged possession of pink pills on page 5 and then describes the pills as peach colored at page 10. In the trial of the misdemeanor, the same officer identifies the pills as orange in color at pages 4 and 15 of this transcript.

First, it may be said that the police officer himself indicates that the pills are Talwin, because he indicates that the pills were produced from a bag held by the defendant from which were recovered some 41 Talwin pills; first in the record of the preliminary hearing at page 12 and in the record of the trial of the misdemeanor at page 6 and 14.

The Court's attention is respectfully directed to the Physician's Desk Reference, a standard drug reference. In the 32nd edition copywrite 1978, published by Medical Economics Company, at page 438 in the Product Identification

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Section thereof, the publication was a photograph of a product manufactured by Winthrop Laboratories bearing the brand name Celwin which, in its 50 milligram dosage is a peach or pink or orange colored tablet, depending upon how the viewer describes that particular color.

3. Double jeopardy and collateral estoppel

It is noted in the original memorandum with reference to the matter of Nathaniel Brown v. State of Ohio, __U.S.___, __ L. Ed. 2d ___, 97 S. Ct. 2221 (1977), the Supreme Court cited therein, among other cases, in the concurring opinion of Justices Brennan and Marshall, Ashe v. Swenson, 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1139 (1970). This case is important to the purposes of this motion because it provides the authority for the application of the civil doctrine of collateral estoppel from the area of civil law into the area of criminal law. Ashe simply says two important things: the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment; and that although first developed in civil litigation, collateral estoppel is an established rule of federal criminal law and therefore it would be applicable to the States.

The defendant, through counsel, prays the Court that the indictment pending against him be dismissed.

E. Hanlin Bavely
Trial attorney for defendant
Of counsel: Kelley, Grossheim & Bavely
1107 Tri-State Bldg.
Cincinnati, Ohio 45202

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CERTIFICATE

I certify that a copy of the supplemental motion has been sent by regular mail on this 14th day of January 1980 to Thomas Sperber, Esquire, office of the prosecutor, 4th floor Hamilton County Courthouse, 1000 Main St., Cincinnati, Ohio 45202, assigned to the Honorable Robert Corman, Judge of the Court of Common Pleas, for the month of January 1980.

E. Hanlon Bayly
trial attorney for defendant Robert Truitt

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(SELL OR OFFER TO SELL SCHEDULE III, IV, V CONTROLLED SUBSTANCES OTHER THAN MARIHUANA)
SECOND OFFENDER
[F-3]

COMPLAINT

HAMILTON COUNTY MUNICIPAL COURT

HAMILTON COUNTY MUNICIPAL COURT
FILED
'79 NOV 13 AM 11:48
ROBERT D. JENNINGS, CLK
HAMILTON COUNTY
SEAL COURT

STATE OF OHIO vs. ROBERT TARLAS TRUITT

3459 PLEASANT VIEW
(Address)
CINCINNATI, OHIO 376 56-1735

DAVID GREGORY, being first duly cautioned and sworn, deposes and says that ROBERT TARLAS TRUITT on or about 11-3-79, in Hamilton County and State of Ohio, did knowingly [1] SELL a schedule [2] IV controlled substance, to wit: [3] TALWIN (PENTAZOCINE) in an amount less than the minimum bulk amount as defined in section 2925.01 of the Revised Code of Ohio, and the said [4] ROBERT TARLAS TRUITT having previously been convicted of a drug abuse offense on or about [5] , contrary to and in violation of Section 2925.03(A)(1) of the Revised Code of Ohio, a felony of the 3rd degree.

The complainant states that this complaint is based on A/C

HAROLD W. MILLS
Notary Public, State of Ohio
My Commission Expires June 29, 1984

Sworn to and subscribed before me this Nov. 3, 1979

Harold W. Mills
Notary Public/~~Deputy Clerk~~/~~Judge~~

David Gregory
(Complainant)

Filed 11-3-79

DISTRICT 1
(Address)

ROBERT D. JENNINGS
Clerk of the Hamilton County Municipal Court

By [signature]
Deputy Clerk

GROUP 9

INSERTS FOR THE ABOVE:
[1] "sell"; "offer to sell".
[2] "III"; "IV"; "V".
[3] Insert the name of the controlled substance.
[4] Insert the name of the defendant.
[5] Insert date the defendant was previously convicted of a drug abuse offense.

Form 8-333HCSB

Hamilton County
Municipal Court
Deputy Court Clerk

47

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2925.11 DRUG ABUSE
(OBTAIN, POSSESS, USE CONTROLLED SUBSTANCE OTHER THAN MARIHUANA)
. FIRST OFFENDER

COMPLAINT

HAMILTON COUNTY MUNICIPAL COURT

CLERK'S OFFICE
HAMILTON COUNTY
MUNICIPAL COURT
NOV 4 1 48 PM '79

STATE OF OHIO vs. ROBERT TARRAS TRUITT

3459 PLEASANT VIEW

(Address)
CINCINNATI, OHIO 276 56 1735

DAVID GREGORY, being first duly cautioned and sworn, deposes and says that ROBERT TARRAS TRUITT on or about 11-3-79, in Hamilton County and State of Ohio, did knowingly[1] POSSESS a schedule IV controlled substance, to wit:[2] TALWIN (PENTAZOCINE) and the said[3] ROBERT TARRAS TRUITT having previously been convicted of a drug abuse offense on or about[4] .....

contrary to and in violation of Section 2925.11 of the Revised Code of Ohio, a[5] MISDEMEANOR OF THE 2ND DEGREE

The complainant states that this complaint is based on A/C

HAROLD W. MILLS
Notary Public, State of Ohio
My Commission Expires June 29, 1984

Sworn to and subscribed before me this NOV. 3, 1979

Harold W. Mills
Notary Public/~~Deputy Clerk~~/~~Judge~~

David Gregory
(Complainant)

Filed 11-3-79

ROBERT H. JENNINGS
Clerk of the Hamilton County Municipal Court

By [illegible] Deputy Clerk

DISTRICT 1
(Address)

CRUZ 9

INSERTS FOR THE ABOVE:

[1] "obtain"; "possess"; "use"
[2] "I," "II," "III," "IV" or "V."
[3] Insert name of controlled substance
[4] Insert name of defendant.
[5] Insert date defendant was previously convicted of a drug abuse offense.
[6] "felony of the 1st degree" if the drug involved is contained in schedules I or II, except marihuana;
"misdemeanor of the 2nd degree" if the drug is listed in schedules III, IV or V.

Form 5 30 DBCRD

By [illegible]
Deputy Court Clerk
48

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CTL NO. 14000762 MUNICIPAL COURT

DEFENDANT: TRUITT/ROBERT/TARRAS SEX M DOB 01/18/40

SEC. VIOL.: 2925-11 /ORCN CHARGE DRUG ABUSE

DATE OF ARREST 11/03/79/1600 BOND SET

PROS. WIT. GREGORY/POLICEOFFICER JUDGE

DEF COUNSEL Montfort - Bl. 4Y

PLEA NG M124 6-031

FINDING:

JOURNAL ENTRY

DATE	ACTION	SIG. OF JUDGE
KMI A 11/05/79	[illegible]	
NOV 8 1979	11-8-79 // B, / 9:00 [illegible]	
	[illegible]	
	[illegible]	
	11-14-79 12 9th fl.	
11-14-79	[illegible]	
	11-14-79 #12 4:00 atty N.S.	
11-19-79	[illegible]	
12/14/79	12/19/79, Rm 17 9 [illegible]	
12/19/79	12/20/79 Rm 15	
	9:00 AM	
12/20/79	Motion to [illegible]	
	Cont pursuant to Rule 36	
	[illegible]	
	pursuant to Rule 15 chap	
///	[illegible] plea & Dealing	

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO
Plaintiff

vs

ROBERT TRUITT
Defendant

FILED B793945
Criminal Division
DEC

DEFENDANT'S MOTION FOR DISCHARGE - DEFENSE OF FORMER JEOPARDY

ISSUE PRESENTED

May a defendant be indicted for and prosecuted for the felony of trafficing in drugs under Ohio Revised Code Section 2925.03 (A) (1) and for specifically trafficing in a scheduled drug known as Talwin when the defendant has previously been prosecuted for and convicted of drug abuse, a second degree misdemeanor under Ohio Revised Code Section 2925.11 when both alleged crimes arise out of a single criminal act, occurrence, episode or transaction?

FACTS

On or about November 3, 1979 the defendant Robert Truitt, who is hereinafter designated as the defendant, was arrested by officers of the Cincinnati Police Department in Cincinnati, Ohio, Hamilton County, for the following offenses which are important to the subject of this motion: drug abuse, a second degree misdemeanor as set forth under Ohio Revised Code Section 2925.11, and trafficing in drugs, under Section 2925.03 (A) (1). Both complaints have the same complainant, one David Gregory, a police officer of District 1 of the Cincinnati Police Department - and each grow out of the same single criminal act, occurrence, episode or transaction. The charges were respectively instituted in the Hamilton County Municipal Court under case numbers 79CRA25170 A for the drug abuse and 79CRA25169 for the trafficing in drugs charge. At a preliminary hearing held with regard to the felony, a copy of the transcript of which is attached hereto and made a part of this motion as Exhibit A; the testimony of Officer Gregory could be generally summarized that the defendant was observed in the act of selling what

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later was determined to be a scheduled drug known by the tradename of Talwin; in a quantity which the police officer in this case alleged is sufficient to satisfy the requirements of the trafficing statute. After observing the defendant allegedly through binoculars, the police officer pursued the defendant and within a short distance of the sale site, arrested the defendant and recovered a quantity of Talwin pills which had allegedly been disposed of by the defendant in attempting to escape from the presence of the officer. The alleged buyer was likewise subsequently arrested and on his person was discovered allegedly a quantity of the purchased Talwin pills. As a result of these arrests the defendant, as mentioned above, was charged with both trafficing in drugs and with drug abuse.

For the purpose of this motion only, it would be admitted that the drug known as Talwin (chemically, pentazocine hydrochloride: 1,2,3,4,5,6 hexaphdro; 6,11 dimethyl 3 (3 methyl 2 buteayl) 2; 6 methano 3 benzazocin 8 ol hydrochloride, a white, crystalline substance soluble in acidic aqueous solutions.) is a Schedule IV drug because of inclusion as a Schedule IVdrug in the federal drug statutes (21 CFR 1308.15 (F)) and thereby, by operation of Ohio statute is included as an Ohio Schedule IVdrug.

Subsequently, the defendant, at the preliminary hearing, was bound over to the grand jury on the felony, but at the specific request of the prosecuting attorney, as is noted in Exhibit A, the misdemeanor drug abuse charge was continued for trial in the Hamilton County Municipal Court. On November 19, 1979 the drug abuse charge - the misdemeanor - was tried in the Hamilton County Municipal Court, after the defendant had entered a plea of not guilty. A transcript of the trial is attached hereto and made a part of this motion as Exhibit B. Over a plea of not guilty, the defendant was found guilty after Officer Gregory testified and after the defendant testified; the defendant was thereafter sentenced to 30 days and costs therefor.

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[The defendant also had been charged with resisting arrest at the same time and was convicted of the charge during this trial, but that charge is not at issue in this particular motion.]

Subsequently, in early December 1979 the defendant was indicted for the charge of trafficing.

PROCEDURAL POSTURE

This motion is a pre-trial motion brought pursuant to Ohio Criminal Rule 12 (B) (1) and is a motion based upon the defense of double jeopardy or once in jeopardy as it is also called, and is a motion which seeks to raise this defense and requests that the defendant, based upon the defense of once in jeopardy, be discharged without further prosecution or trial.

ARGUMENT

For the purpose of this motion it is important to look at the element of the two charges:

2929.03 [trafficing in drugs]
"(A) No person shall knowingly do any of the following:
(1) Sell or offer to sell a controlled substance in an amount less than the minimum bulk amount as defined in §2925.01 of the Revised Code..."

2925.11 [drug abuse]
"(A) No person shall knowingly obtain, possess or use a controlled substance."

It would appear that in order to be in a position to sell or offer to sell a controlled substance, that an individual would have to be physically in possession of the controlled substance in order to be in a position to be offering it for sale. It is argued, therefore, that the charge of drug abuse by its elements which essentially are possession of the controlled substance, is a lesser included offense of the charge of trafficing in drugs - it would seem that if the State somehow was unable to prove that the defendant in this case actually was selling

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Opposition

ORIGINAL

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SUPREME COURT, U.S.

NO. 81-5035

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT T. TRUITT :

Defendant-Petitioner :

vs. :

STATE OF OHIO :

Plaintiff-Respondent :

MEMORANDUM BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE FIRST APPELLATE DISTRICT OF OHIO.

Simon L. Leis, Jr.
Prosecuting Attorney

Leonard Kirschner
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Attorney for Defendant-Petitioner

QUESTIONS PRESENTED

WHETHER A DEFENDANT CAN BE PROSECUTED FOR TWO COMPLETELY SEPARATE AND DISTINCT CRIMINAL CHARGES INVOLVING DISTINCT STATUTORY PROVISIONS; EACH OF WHICH CRIMINAL CHARGE REQUIRES PROOF OF A FACT THAT THE OTHER DOES NOT REQUIRE AND WHERE THERE HAS BEEN A TIME INTERVAL BETWEEN THE COMMISSION OF EACH OF THE CRIMINAL ACTS INVOLVED.

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NO. 81-5035

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT T. TRUITT :

Defendant-Petitioner :

vs. :

STATE OF OHIO :

Plaintiff-Respondent :

MEMORANDUM BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE FIRST APPELLATE DISTRICT OF OHIO.

OPINIONS BELOW

The opinion of the Court of Appeals of the First Appellate District rendered on February 4th, 1981 is set forth in Appendix "A" of this brief. The opinion of the trial court is set forth in Appendix "B".

JURISDICTION

Although the respondent state disagrees with some of the factual conclusions of the defendant-petitioner in his jurisdictional statement, we concur that he has set forth in his Petition for Certiorari an adequate basis for jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land of naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law, nor shall private property be taken for publice use, without just compensation."

II

OHIO REVISED CODE, SECTION 2925.03 (A)(1) AND SECTION 2925.03 (D)(1)

"2925.03 (Trafficking in Drugs)

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance in an amount less than the minimum bulk amount as defined in section 2925.01 of the Revised Code; . . . . .

(D) If the drug involved is any compound, mixture, preparation, or substance included in Schedule III, IV or V, whoever violates this section is guilty of trafficking in drugs.

(1) Where the offender has violated divisions (A)(1) or (A)(2) of this section, trafficking in drugs is a felony of the fourth degree and if the offender has previously been convicted of a drug abuse offense, trafficking in drugs is a felony of the third degree."

III

OHIO REVISED CODE SECTIONS 2925.11 (A) AND 2925.11(C)(2)

"2925.11 (Drug Abuse)

(A) No person shall knowingly obtain, possess or use a controlled substance. . . . .

(C) Whoever violates this section is guilty of drug abuse:

(2) If the drug involved is a compound, mixture, preparation, or substance included in Schedule III, IV, or V drug abuse is a misdemeanor of the third degree, and if the offender has previously been convicted of a drug abuse offense, drug abuse is a misdemeanor of the second degree."

IV

CRIMINAL RULE 12 (B)(1)

"Pleadings and Motions Before Trial: Defenses and Objections . . . .

(B) Pre-Trial Motions

Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. The following must be raised before trial:

(1) Defenses and objections based on defefects in the institution of protection; . . . ."

STATEMENT OF THE CASE

STATEMENT OF PROCEEDINGS

The defendant-petitioner in these proceedings was arrested on November 3rd, 1979 for the crime of sale of Schedule IV controlled substance pentazocine also known as talwin. He was indicted for Trafficking in Drugs (sale of pentazocine) in violation of Ohio Revised Code 2925.03 (A)(1) on December 4th, 1979. On December 21st, 1979 he filed a Motion for Discharge on the basis of having been once in jeopardy. The matter came on for an initial hearing on January 11th, 1980 and was continued for further hearing until January 17th, 1980. On January 17th, 1980 the Court orally granted the Motion for Discharge and continued the matter for entry. On February 5th, 1980 a hearing was had relative to the presentation of entries. On that date the Court signed and the Clerk docketed and journalized the Entry Granting Defendant's Motion to Dismiss on the basis of former jeopardy (See Appendix "B"). A timely Notice of Appeal by the plaintiff-appellant was filed from that decision. After briefs were filed and arguments heard, the Court of Appeals rendered their decision on February 4th, 1981 (Appendix "A) in which they reversed the judgment of the trial court. The defendant-petitioner then endeavored to have the Ohio Supreme Court accept jurisdiction of the case. After briefs were filed the Ohio Supreme Court on May 20th, 1981 refused to accept the case and denied jurisdiction. Defendant-petitioner then filed his proceedings in this Court.

STATEMENT OF FACTS

The statement of facts as per the records reflect that Cincinnati police officers on November 3rd, 1979 were on a stakeout of the area of Fifteenth and Race Streets in Cincinnati, Hamilton County, Ohio relative to suspected drug activity going on at that general location (TP, Preliminary Hearing, P. 4 and 5). From their vantage point the police observed the defendant-petitioner Truitt hand a Mr. Carter several pills after Mr. Carter had given an associate of Truitt some money. (TP 5). After the sale had been consumated the defendant-petitioner Truitt and his associate were eastbound

on Fifteenth Street towards Republic Street (TP 5 and 6). As uniformed police officers came on the scene the defendant-petitioner Truitt went up Republic Street at a location of about 1504 to 1510 Race Street (TP 6). At that location the defendant-petitioner Truitt was confronted by a police officer and he dropped a bag that he was carrying and ran back to the alleyway. The defendant-petitioner Truitt was later apprehended on Republic Street (TP 6)

The person who had purchased the pills from the defendant-petitioner had walked up Race Street after the transaction had been completed and was subsequently apprehended at Fifteenth and Race Streets. The pills which the defendant-petitioner sold to the third person were in his (the third person's) hands when that third person was apprehended on Liberty Street (TP 6 and 7). The defendant-petitioner was then charged with the crimes of possession of Talwin (the drugs found in the bag which he dropped) and sale of drugs (the drugs that he previously sold the third person); HE WAS NOT CHARGED WITH POSSESSION OF THE DRUGS WHICH HE HAD PREVIOUSLY SOLD. (Capitalization ours for emphasis.) He was found guilty of the misdemeanor possession charge and thereafter based his Motion for Discharge on the basis of double jeopardy on the fact that he was found guilty in the Municipal Court of the completely separate and distinct offense.

REASONS FOR DENYING WRIT

Based upon the guidelines and interpretations given to the "Double Jeopardy" clause of the Fifth Amendment to the United States Constitution, we feel that there is no question that the Court of Appeals of the First Appellate District was correct in determining that the defendant-petitioner's prosecution was not barred under the doctrine of the Fifth Amendment.

We believe that there is a fundamental difference in the factual basis upon which the petitioner relies as against the factual basis as reflected in the record of the proceedings and the Court's opinion thereon.

We concede the fact that there were two completely separate and distinct charges involved and that the defendant was convicted on the misdemeanor charge prior to the Motion to Dismiss on the felony charge.

Our points of difference with the petitioner are that there are two completely separate and distinct charges and that each charge requires proof of facts not necessary to be proven by the other charge; and that there are two completely separate and distinct transactions involved.

The defendant-petitioner was convicted of violating Ohio Revised Code 2925.11 which was the misdemeanor drug offense. That code section provides that:

> "No person shall knowingly obtain, possess, or use a controlled substance . . ."

It is to be noted that the necessary elements of that case mandate that the person must "OBTAIN, POSSESS, OR USE A CONTROLLED SUBSTANCE". The defendant was convicted in the Hamilton County Municipal Court of the misdemeanor offense of possessing the controlled substance.

We then look to see what the defendant is charged with in the felony offense. He was charged with the offense of "sell"ing a controlled substance. The trial court in its Finding number 8 stated:

> "That the Talwin which was sold to the purchaser was not the same Talwin which the defendant was charged with the possession of."

Nowhere under Ohio Revised Code 2925.03 (A)(1) is the defendant required to have actual possession of the drug. A person can "sell or offer to sell a controlled substance" without actually having possession of the controlled substance.

Thus we have a situation that under Ohio Revised Code 2925.03 (1) a person can sell or offer to sell a controlled substance without having possession of said drug; and under Ohio Revised Code 2925.11 a person can "obtain, possess, or use a controlled substance" without "sell(ing) or offer(ing) to sell a controlled substance". It is clear that each of the crimes involved the proof of certain facts not necessitated in the proof of the other crime. This is not the situation of a person who possesses a controlled substance and sells that controlled substance to a third party and is then arrested for the crimes of possessing and selling the same controlled substance. In fact, as previously indicated, the trial court specifically made a finding that the controlled substance (Talwin) which was the basis of the possession charge WAS NOT THE SAME controlled substance (Talwin) which was the basis of the selling charge.

This Court in the case of Brown vs. Ohio, 432 U.S. 161, 53 L Ed (2d) 187, 97a S. Ct. 2221 (1977) said at page 166 of the U.S. reports:

> "The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishments was stated in Blockburger vs. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L Ed 306 (1932)
>
> > 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not . . .'
>
> This test emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the Blockburger test is satisfied, not withstanding a substantial overlap in the proof offered to establish the crimes . . .' Iannelli vs. United States, 420 U.S. 770, 785 n. 17, 95 S. Ct. 1284, 1294, 43 L Ed 2d 616 (1975)."

As previously indicated it is our belief that there

were two completely seaparate and distinct transactions. However, even if this is factually so, we submit that under the Blockburger test (supra) we still have two completely separate and distinct offenses; each of which requires proof of an element in the crime charged that the other does not require proof of.

We further submit that the second prosecution would not require the relitigation of any of the factual issues necessary to prove the first prosecution.

As previously indicated it is our belief that we do not have one transaction but rather two completely separate and distinct transactions.

In this case,as reflected in the Findings and the records,the defendant-petitioner made a sale of Talwin to a third person. At the conclusion of that transaction (sale) the third person went down one street and the defendant and his friend started walking down a separate street which streets were going in completely separate directions. After a short period of time the officers approached the defendant-petitioner at which time he took off running. After a chase down several streets and yards the defendant-petitioner was apprehended. Just prior to his apprehension he threw down a bag of pills (controlled substance Talwin). At the time the police approached the defendant-petitioner the sale had been completed The parties were going their separate ways. The controlled substance which was the basis of the defendant's conviction under Ohio Revised Code 2925.11 (A) (possession) was not the same controlled substance which was the basis of the indictment for the sale of a controlled substance (Ohio Revised Code 2925.03 (A)(1)).

It is interesting to note the comments of this Court relative to the factual background of the Blockburger case (supra) are equally applicable to this case. In the Blockburger case (supra) the defendant's attorney endeavored to reflect that the individual sales of morphine by the defendant were merely a portion of one transaction and that the doctor defendant could not be prosecuted for multiple sales. Basically counsel for the defendant-petitoner is urging this Court to

accept the same arguments it rejected in Blockburger (supra).

This Court in the Blockburger case (supra) at page 302 said:

> "The Narcotic Act does not create the offense of engaging in the business of selling the forbidden drugs but penalizes any sale made in the absence of either of the qualifying requirements set forth. EACH OF SEVERAL SUCCESSIVE SALES CONSTITUTES A DISTINCT OFFENSE HOWEVER CLOSELY THEY MAY FOLLOW EACH OTHER . . . . 'The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately . . . If the latter, there can be but one penalty.'
>
> In the present case the first transaction resulting in a sale, had come to an end. The next sale was not the result of the original impulse." (Capitalization ours for emphasis.)

So it is in the case currently before the Court. The statute which the defendant has been charged with does not make it a crime to be in the business of selling drugs. It is directed toward a single impluse. "NO PERSON SHALL SELL OR OFFER TO SELL" a controlled substance. There is but a single impulse or act involved.

At the time the police arrested the defendant-petitioner for possession of drugs other than that which he had previously sold, the sale had been completed and the parties to the transactions were going their separate ways in separate directions. Clearly the sale transaction had been concluded. The sale transaction was a completely separate and distinct transaction from the possession transaction.

CONCLUSION

In conclusion we submit that the Petition for Certiorari should be denied in this case for two reasons:

(1) There were two completely separate and distinct transactions; and,

(2) Each of the crimes charged required proof of elements of the crime not necessary in the proof of the other crime.

Under the pronouncements of this Court in the Blockburger case (supra) which the Court of Appeals of the First Appellate District jurisdiction followed in their decision, we submit that there is no question of double jeopardy in this case and this Court should deny the Petition for Writ of Certiorari.

Respectfully,

Simon L. Leis, Jr.
Prosecuting Attorney

Leonard Kirschner
Assistant Prosecuting Attorney

Thomas Sperber
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CERTIFICATION

I hereby certify on this 7th day of August, 1981 I have posted a copy of the above entitled Memorandum Brief in Opposition to the Petition for a Writ of Certiorari to opposing counsel by posting same in the United States mails, prepaid, addressed to E. Hanlin Bavely, Attorney at Law, 1107 Tri-State Building, Cincinnati, Ohio, 45202.

Leonard Kirschner
Assistant Prosecuting Attorney

APPENDIX A

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO, : NO. C-800098

Plaintiff-Appellant,

vs. D E C I S I O N.

ROBERT T. TRUITT,

Defendant-Appellee. :

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IMAGE 61

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CLERK OF COURTS

Messrs. Simon L. Leis, Jr., Leonard Kirschner and Thomas Sperber, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Mr. E. Hanlin Bavely, 1107 Tri-State Building, Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

The State of Ohio as appellant seeks reversal of the trial court's dismissal of the indictment and discharge of the defendant by reason of former jeopardy. The state asserts in its single assignment that the court below erred in holding that the prosecution for the sale of a controlled substance was barred by defendant's earlier misdemeanor conviction for possession of a separate and distinct quantity of drugs. We agree with the State.

Defendant was the subject of a police surveillance designed to observe suspected drug trafficking at a particular location. The officers observed the defendant deliver several pills, later identified as Talwin (pentazocine), to an individual in exchange for currency. At the approach of uniformed police officers, the pair walked away in different directions. The defendant discarded a bag he was carrying before he was finally apprehended, and the bag contained Talwin.

The defendant was charged with both possession of a controlled substance (Talwin found in the bag) and sale of a controlled substance (Talwin delivered to the individual). The possession charge, a misdemeanor, was tried separately in the Hamilton County Municipal Court, and the defendant was found guilty. It is this conviction that was the basis of his motion in the Court of Common Pleas to dismiss the sale charge, which under the allegations of the indictment was a felony of the second degree.

The law applicable to this case is found in *Blockburger v. United States* (1932), 284 U.S. 299. The *Blockburger* rule, simply stated, is that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." (Emphasis added.) *Id.* at 304. The state asserts that the appropriate application of the *Blockburger* rule requires an analysis of the elements comprising the two offenses. We agree with the state's desired result but not with its reasoning.

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IMAGE 62

We agree that *Blockburger* makes the definitive statement of the law, but we hold that on the facts *sub judice*, the first step in applying the *Blockburger* test requires us to determine whether the two offenses charged stem from the same act or transaction. We do not reach and do not decide whether from an abstract point of view each of the statutes involved includes an element not shared by the other.

The facts of *Blockburger* are helpful in implementing the test. Therein the defendant was charged *inter alia* with the sale of morphine to an individual and also with a second sale of morphine to the same individual on the following day. In affirming the two convictions, the Supreme Court held that the first sale had been completed and that the second sale, however close in time, was a separate and distinct transaction. The court distinguished between offenses which are continuous in character and those that consist of an isolated act.[1] *Id.* at 302.

The record in the instant case indicates that the defendant sold a particular quantity of pills to an individual. Shortly after that transaction was completed, the defendant was apprehended with constructive possession of a quantity of pills separate and distinct from those involved in the sale. The defendant was not charged with possessing the drugs he sold, nor with selling the drugs later found in his constructive possession. We hold that the defendant's possession of the additional pills was an act separate and distinct from the sale.

This principle is illustrated by a more obvious example. Assume the defendant had been successful in his flight from the police immediately after the sale, but was apprehended a month later with

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IMAGE 63

a quantity of Talwin on his person. The double jeopardy provisions would, without doubt, allow his prosecution for both the prior sale and the later possession. We fail to see how the immediacy of defendant's arrest in the instant case should lead to a different result. The legislature has decreed that possession is one offense and sale is another, and the defendant was charged with two separate offenses. The legislature has not chosen to make a crime of dealing in (pushing) drugs as a continuing course of conduct, but to proscribe a series of acts committed while dealing in drugs with a separate punishment for each. *See Whalen v. United States* (1980), 100 S. Ct. 1432.

A useful analogy is supplied by the case of *State v. Roberts* (1980), 62 Ohio St. 2d 170, 405 N.E.2d 247, in which a different aspect of double jeopardy was considered. The defendant therein was charged with both the possession for sale of a narcotic drug and with the sale of a narcotic drug.[2] The court held that the statute prohibiting two convictions for allied offenses of similar import (R.C. 2941.25) allowed him to be convicted of only one of those offenses, because "the facts demonstrate that both charges were based upon a single sale and involve the same parties and the same type and quantity of drugs, and it is not proven that the defendant possessed a quantity of any type of narcotic drug in excess of the amount sold. . . ." *Id.* at 174. The court reasoned that in such circumstances the defendant's possession of the drugs was incidental to and an indivisible part of the sale. In the instant case, the drugs possessed by the defendant were not the drugs he sold.

The single assignment has merit.

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IMAGE 64

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The appellee's brief includes a section designated as an assignment of error, wherein he claims that the state failed to obtain leave to appeal in a timely and proper manner. However, appellee did not file a notice of cross-appeal, and we ignore the attempt to present the issue because it is not properly before this Court. *See* App. R. 4; *State, ex rel. Bossa v. Giles* (1980), 64 Ohio St. 2d 273, 274, n.1, ___ N.E.2d ___.

We reverse the judgment below and remand this case for further proceedings.

CASTLE, P. J., PALMER and BLACK, J. J.

1. The Supreme Court contrasted the facts of *Blockburger* with those of *Ex Parte Snow* (1887), 120 U.S. 274, wherein it was held that the offense of cohabitating with more than one woman was a continuous offense having duration and not an isolated act under the statute in question.

2. The defendant in *Roberts* was charged under the now repealed provisions of R.C. 3719(20)(A) and R.C. 3719.20(B).

PLEASE NOTE:

The Court has placed of record its own try in this case on the date of the release of this Decision.



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IMAGE 5

APPENDIX B

IN THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

STATE OF OHIO	:	
Plaintiff-Respondent	:	B-793945
vs.	:	
ROBERT T. TRUITT	:	ENTRY GRANTING DEFENDANT'S MOTION TO DISMISS ON BASIS OF FORMER JEOPARDY
Defendant-Movant	:	

This matter having come on for hearing on the defendant's motion for discharge, defense former jeopardy and the supplemental memorandum and the dockets records and journal entries and the transcript of a criminal trial of the defendant on a possession of talwin charge and based upon said matters submitted to this court, this court does hereby find that:

(1) The defendant was observed by police officers with binoculars participating in the sale of drugs, to-wit Talwin on November 3, 1979 at the corner of Fifteenth and Race Streets in the City of Cincinnati County of Hamilton and State of Ohio.

(2) That the defendant obtained [illegible] Talwin pills from his pocket.

(3) That the defendant and his associate started walking east on Fifteenth Street to Republic Street

IMAGE 6

(4) That the purchaser of the Talwin started walking north on Race Street.

(5) That an attempt was made to apprehend the defendant on the drug sale which had been previously observed at Fifteenth and Race Streets at which time the defendant took off running through a yard at about 1505 Republic Street and back through a vacant yard between 1504 and 1510 Race Street in Cincinnati, Hamilton County, Ohio

(6) That when the police officer identified himself as a police officer the defendant threw down a brown paper bag which later was determined to have contained Talwin.

(7) That the defendant was later charged with the misdemeanor offense of possession of Talwin which was in the brown paper bag at the time of his apprehension in the vacant yard between 1504 and 1510 Race Street and he was charged with sale of Talwin which had occurred earlier at the corner of Fifteenth and Race Streets.

(8) That the Talwin which was sold to the purchaser was not the same Talwin which the defendant was charged with the possession of.

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IMAGE 7

(9) That the Talwin which was sold by the defendant was recovered from the purchaser of same at the corner of Liberty and Race Streets.

(10). That the defendant was tried and found guilty of the possession of Talwin found in the brown paper bag which he dropped at the time of his apprehension.

(11) That the charge which is currently pending in this court on this indictment relates to the Talwin sold at the corner of Fifteenth and Race Streets.

Based upon the above findings of fact this court does hereby find that the motion to dismiss based upon former jeopardy is well taken by reason of the defendant's prior trial on the possession charge which bars the defendant's trial in this matter under the doctrine that the defendant has been found to have been in jeopardy RMC As set forth further by the Court's oral PRONOUNCEMENT AT THE TIME OF THE HEARING. RMC

This court does therefore grant the motion to dismiss the charge in this case and said indictment is hereby dismissed.

Jos defendant